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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JOHN BERNARD JOSEPH, Defendant and Appellant.	B210365 (Los Angeles County Super. Ct. No. NA072278)

APPEAL from a judgment of the Superior Court of Los Angeles County, John David Lord, Judge. Affirmed.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

John Bernard Joseph was convicted by a jury of four counts of lewd conduct with a minor and sentenced to an aggregate state prison term of three years. Joseph contends the trial court made multiple evidentiary errors, including admitting hearsay and evidence of his prior uncharged sexual offenses. He also asserts the prosecutor committed prejudicial misconduct. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Information*

An information charged Joseph with committing four separate acts of lewd conduct upon his granddaughter, D. Each of the unlawful acts was alleged to have been committed on or between June 1, 2006 and December 21, 2006, when D. was 15 years old and Joseph was 69 years old. (See Pen. Code, § 288, subd. (c)(1).)[1]

2. *The Trial*

a. *D.'s testimony at trial*

D., along with her twin brother, came to the United States in 2001 from the Commonwealth of Dominica[2] to live with Joseph, her paternal grandfather, and Joseph's wife. At that time, D. was 10 years old. For several years, Joseph showed D. little physical affection or attention. In 2006, however, when D. was 15 years old, Joseph began to pay more attention to her. Joseph repeatedly asked D. if she loved him and insisted she kiss him. D. responded by telling him she loved him and complied with his requests by kissing him on the cheek.

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1 Penal Code section 288, subdivision (c)(1), provides, "Any person who commits an act described in subdivision (a) with the intent described in that subdivision, and the victim is a child of 14 or 15 years, and that person is at least 10 years older than the child, is guilty of a public offense . . . ." Subdivision (a) of Penal Code section 288 provides, "[a]ny person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony . . . ."

Statutory references are to the Penal Code unless otherwise indicated.

2 The Commonwealth of Dominica is an island nation in the southern part of the Caribbean Sea.

Soon, Joseph's advances became more overt and sexual. On one occasion he came into D.'s room while she and her brother were talking, demanded her brother go downstairs to do chores, reclined on her bed with her and insisted she kiss him. When she leaned over and attempted to kiss him on the cheek, he maneuvered his body to kiss her on the lips and then thrust his tongue into her mouth.

On another occasion Joseph called D. into his room, pulled her down on his bed, told her he loved her, put his hand under her pajama shirt to rub her bare breast, then raised her shirt up to her neck and put his mouth on her bare breast. When she began to cry, he told her to leave. A few minutes later he asked her if he could "touch her other breast." She said no, and he left her alone.

On a third occasion, while she helped him bag peanuts, Joseph grabbed her wrist, forced her to sit on his lap, put his hand down her pants on top of her underwear and rubbed her pubic area, telling her she was growing into a "young woman."

At some point after Joseph's first act of sexual misconduct toward D., he slapped her on her buttocks over her clothes while the two were in the kitchen together and gave her a "creepy" smile.

b. *Evidence of prior sexual misconduct*

Pursuant to Evidence Code section 1108,[3] the court allowed Joseph's daughter, A.A., to testify that Joseph had molested her repeatedly, beginning in 1979 or 1980, when she was 14 or 15 years old and had come to live with him from Dominica. According to A.A., on several occasions Joseph told her she was "special" and he loved her, then fondled her breasts and put his hand down her pants. He repeatedly kissed her in a sexual way, telling her he loved her. After a while, he demanded she have sexual intercourse with him and threatened to send her back to Dominica unless she complied. At first she

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3 Evidence Code section 1108, subdivision (a), provides, "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by [Evidence Code] section 1101, if the evidence is not inadmissible pursuant to [Evidence Code] [s]ection 352."

refused; but, afraid and under duress, she ultimately acquiesced. A.A. testified she was forced to have sexual intercourse with her father between 50 and 100 times during the time she lived with him.

A.A. admitted she had threatened Joseph with a knife in 1989. According to A.A., her younger sister, C.W., had revealed to her that Joseph had begun touching her breasts in a sexual way. When C.W. reported Joseph's actions to A.A., A.A. became incensed, grabbed a kitchen knife and threatened Joseph, telling him he would not "do to C.W. what he had done" to her.

Jane M. testified she had lived with Joseph and his wife for six months in 1984 when she was 18 or 19 years old. Jane, who is not related to Joseph, had no place to live at that time; and Joseph and his wife both agreed she could stay with them. While she stayed at Joseph's home, Joseph would come into her bedroom and put his hands under her clothes or pajamas and touch her breasts and her vagina. He told her he wanted to make her "feel good." This happened several times over two or three months until Jane moved out.

c. *Defense evidence*

Joseph testified in his own defense. He denied ever touching D. apart from an occasional peck on the cheek. He never put his tongue in her mouth or put his hands under her clothing or on or near her breasts or genitals. He may have brushed by her in the kitchen on his way to the bathroom, but never touched her buttocks. According to Joseph, D. fabricated each of the incidents because he was a strict disciplinarian and D. and her brother did not like it.

Joseph also denied having touched A.A. or Jane in a sexual way. Joseph believed A.A. had made up her accusations because she had long resented him for not having married her mother and was intent on ruining his life. Jane was a good friend of A.A.'s and would do anything for her.

Joseph's son, Matthew Joseph, testified his father was a good man and not the type of person to molest anyone, much less his own daughter or granddaughter. Matthew Joseph explained A.A. was not a truthful person and had long resented Joseph for his

strict discipline. He opined this plot to ruin his father was hatched by A.A., and D. had assisted her in fabricating these accusations because she is a "follower."

Verna Jacobs, Joseph's niece, now 42 years old, testified she had lived with Joseph in the Virgin Islands when she was between the ages of 8 and 14 years old, and again in 1991 through 1998, while her husband was in the army. Jacobs claimed Joseph never touched her inappropriately and believes the accusations of sexual misconduct are entirely inconsistent with the man she knows.

3. *The Verdict and Sentence*

The jury convicted Joseph on all four counts of lewd conduct. The trial court sentenced Joseph to the upper term of three years on the first count, with concurrent three-year terms for the remaining counts.

DISCUSSION

1. *The Trial Court Did Not Commit Prejudicial Error in Admitting A.A.'s Testimony Regarding Statements Made by Her Sister and Cousin*

In addition to testifying Joseph had repeatedly molested and raped her during the time she lived with him, A.A. also testified to a number of other matters she had learned from her sister and her cousin Muna, each of which Joseph asserts is inadmissible hearsay.

a. *Testimony concerning Joseph's fondling of C.W.*

In 1989 C.W. reported to A.A. Joseph had touched and squeezed her breasts as she was coming out of the bathroom. According to A.A., after C.W. told her about the incident, A.A. became angry, grabbed a kitchen knife and threatened Joseph with it.

Initially, defense counsel objected to the prosecutor's offer of proof on hearsay grounds and pursuant to Evidence Code section 352. In response, the prosecutor asserted the testimony was not offered for the truth of the matter asserted (that Joseph had groped C.W.), but to explain A.A.'s aggressive conduct. The prosecutor said the testimony would not be presented if defense counsel did not introduce evidence A.A. had threatened

Joseph with a knife. After consulting with Joseph, defense counsel withdrew his objection.[4]

Joseph now argues A.A.'s testimony concerning C.W.'s statements constituted inadmissible hearsay[5] and his counsel provided ineffective assistance in withdrawing his objection to it. The evidence was properly admitted for a nonhearsay purpose—to explain A.A.'s state of mind and motivation for threatening Joseph with a knife. (See *People v. Thornton* (2007) 41 Cal.4th 391, 447 [Whenever an utterance is offered to evidence """"state of mind [that] ensued in another person in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible. . . .""" [Citation.] Such evidence is not hearsay."].) Accordingly, defense counsel's withdrawal of his hearsay objection did not constitute ineffective assistance. (*See People v. Thomas* (1992) 2 Cal.4th 489, 531 [failure to make meritless objection does not constitute ineffective assistance of counsel]; see also *People v. Cudjo* (1993) 6 Cal.4th 585, 616 ["[b]ecause there was no sound legal basis for objection, counsel's failure to object to the admission of the evidence cannot establish ineffective assistance"].)

b. *Testimony concerning Alice P.'s parentage*

At a pretrial hearing the prosecutor informed the trial court he intended to present evidence, through the testimony of Alice P., that Joseph had fathered Alice with Irma C., another of Joseph's daughters. The court indicated the testimony would be allowed under the hearsay exception for family history, but, in light of some uncertainty as to whether

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4 Defense counsel explained the decision: "[L]et's go ahead and we were going to get into the knife, the aspect of her attacking him with the knife does show bias on the part of the witness; and if the People are seeking to explain that with allegations that have been put out there, then so be it."

5 "'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200.) Subject to certain exceptions, hearsay evidence is generally inadmissible. (Evid. Code, § 1201.)

Alice would testify, ordered that no reference be made to the anticipated testimony in opening statement.

Alice did not testify at trial. Instead, A.A. testified Joseph had fathered a child with her sister, Irma. According to A.A., that daughter, Alice, was born in 1967 or 1968, making Irma 15 years old at the time she gave birth. Defense counsel objected to this testimony at trial. The court appears to have allowed the testimony under a family history exception to the hearsay rule although nothing in the record indicates which exception to the hearsay rule the court applied.

Joseph contends A.A.'s testimony concerning Alice's parentage was necessarily based on information acquired from someone else and constitutes hearsay that is not subject to any recognized exception. He also asserts the evidence, whether or not subject to a recognized hearsay exception, violated his Sixth Amendment right to confrontation. (See *Crawford v. Washington* (2004) 541 U.S. 36, 68 [124 S.Ct. 1354, 158 L.Ed.2d 177) (*Crawford*) [out-of-court statements offered for the truth of the matter asserted that are testimonial in nature are barred by the Sixth Amendment's confrontation clause unless declarant is unavailable and the defendant had a prior opportunity to cross-examine declarant]; *Davis v. Washington* (2006) 547 U.S. 813, 823, 825 [126 S.Ct. 2266, 165 L.Ed.2d 224]; *People v. Cage* (2007) 40 Cal.4th 965, 981.)

The People concede the evidence is hearsay because A.A. could only have acquired information about Alice's parentage from someone else, but contend the fact of Alice's parentage is subject to one of the family history exceptions for hearsay. The People also assert any family conversations about Alice's parentage were nontestimonial and therefore not precluded by the confrontation clause.

The Evidence Code contains several exceptions to the hearsay rule in connection with the reporting of family history. Evidence Code section 1311, subdivision (a)(1), provides in part, "Evidence of a statement concerning the birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or other similar fact of family history of a person other than the declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness" and the

declarant "was related to the other by blood or marriage." Similarly, Evidence Code section 1313 provides, "Evidence of reputation among members of a family is not made inadmissible by the hearsay rule if the reputation concerns the birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or other similar fact of the family history of a member of the family by blood or marriage."

Joseph argues Evidence Code section 1311 is inapplicable because the prosecutor never adequately established Irma's unavailability. At the threshold, because defense counsel did not raise this point in the trial court, the actual declarant—the person who told A.A. that Joseph had fathered Alice—was never specifically identified.[6] Perhaps for that reason, even assuming Irma was the person who provided this information to A.A., no record of Irma's unavailability was adequately developed. The People, seeking to rely on the family history exception to the hearsay rule, had the burden of proving its applicability. (See *People v. Livaditis* (1992) 2 Cal.4th 759, 778-780 ["[t]he proponent of hearsay has to alert the court to the exception relied upon and has the burden of laying the proper foundation"].)

Apparently recognizing this bar to admissibility, the People insist A.A.'s testimony concerning the parentage of her half-sister/niece, Alice, was nonetheless admissible under Evidence Code section 1313. However, this too, is questionable because A.A. did not testify her knowledge was based on Alice's or Joseph's reputation within the family, a prerequisite to the applicability of this hearsay exception.

Nonetheless, even if this testimony were erroneously admitted into evidence and assuming any error must be analyzed under the strict standard for federal constitutional error (see *People v. Cage*, *supra*, 40 Cal.4th at pp. 991-992 [harmless-beyond-reasonable-

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6 A.A. testified Irma had told her she was 15 years old when she gave birth to Alice. The trial court sustained a hearsay objection to that testimony. However the court allowed A.A. to testify to Irma's and Alice's ages, thereby allowing the jury to calculate Irma's age at the time she gave birth. The basis for A.A.'s testimony that Alice was, in fact, Joseph's daughter, seems not to have been questioned at trial.

doubt standard for federal constitutional error applies to *Crawford* error]),[7] its admission does not compel reversal. A.A. testified Joseph, her father, had forced her to have sex with him between 50 and 100 times while she lived with him. In light of that testimony, evidence that Joseph had impregnated another of his underage daughters (Irma) while she lived with him was cumulative and harmless beyond a reasonable doubt.

c. *Testimony repeating Muna's statements about D.*

At trial A.A. testified her 28-year-old niece Muna had told her that something appeared amiss with D. According to A.A., Muna said D. had begun to act strangely; and Muna had seen Joseph kiss D. inappropriately on the mouth. Muna communicated to A.A. her fear that Joseph had begun molesting D.

This portion of A.A.'s testimony was inadmissible hearsay, and Joseph is correct the trial court erred in overruling his objection to it. As the People acknowledge, the evidence was not offered for a nonhearsay purpose and was not subject to any recognized hearsay exception. Moreover, Muna's statements might qualify as testimonial so that their admission into evidence implicates Joseph's Sixth Amendment confrontation right under *Crawford, supra,* 541 U.S. 36. (See *People v. Cage, supra,* 40 Cal.4th at p. 984.) Nonetheless, in light of D.'s testimony as to the identical facts, and the other overwhelming testimony against Joseph, the admission of this limited portion of A.A.'s testimony is harmless beyond a reasonable doubt. (*People v. Cage*, *supra*, 40 Cal.4th at pp. 991-992.)

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[7] We have significant doubts whether statements asserting Joseph had fathered a child with one of his daughters more than 40 years ago are testimonial within the meaning of recent confrontation clause cases. (See *People v. Cage, supra,* 40 Cal.4th at p. 984 [to be considered testimonial, "the statement must have been given and taken *primarily* for the *purpose* ascribed to testimony—to establish or prove some past fact for possible use in a criminal trial"].)

2. *The Court Did Not Err in Admitting Evidence of Joseph's Prior Uncharged Sex Offenses*

Evidence of a prior sex offense is relevant to show the defendant's propensity to engage in the charged sex crimes and, on that basis, is admissible subject to an evaluation under Evidence Code section 352 whether its probative value is substantially outweighed by the probability that its admission would unduly prejudice the defendant or mislead the jury. (Evid. Code, § 1108; *People v. Falsetta* (1999) 21 Cal.4th 903, 907, 916-917; *People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1013.)

The trial court enjoys broad discretion under Evidence Code section 352 in determining whether the probative value of evidence of prior uncharged offenses is unduly prejudicial. (See generally *People v. Kelly* (2007) 42 Cal.4th 763, 783.) In weighing whether the Evidence Code section 1108 propensity evidence is unduly prejudicial, the court should consider "such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*People v. Falsetta*, *supra*, 21 Cal.4th at pp. 916, 917.)

We review for an abuse of discretion a trial court's determination pursuant to Evidence Code section 352 that the probative value of evidence outweighed its potential for confusion or undue prejudice. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1118.) Even if the court abused its discretion, reversal is not warranted unless "'it is reasonably probable that a result more favorable to [defendant] would have been reached in the absence of the error.'" (*People v. Page* (2008) 44 Cal.4th 1, 42.)

Joseph contends the court abused its discretion in admitting evidence of Joseph's prior uncharged sex offenses against A.A. and Jane. He contends the evidence was too remote (Joseph committed the acts against both Jane and A.A. more than 20 years prior

to trial), too dissimilar to the charged crimes, too inflammatory, too uncertain (because Joseph had not been charged or convicted of any offense) and created a probability of confusion.

Similar arguments were made in *People v. Branch* (2001) 91 Cal.App.4th 274, 285 (*Branch*), a case that bears some strong similarities to the instant one. In *Branch* the defendant was charged with committing a lewd act on his 12-year-old step-great-granddaughter. The trial court admitted evidence under Evidence Code section 1108 (over the defendant's Evidence Code section 352 objection) that the defendant had committed a series of prior uncharged sexual offenses against his step-daughter 30 years earlier when she, too, was 12-years old. In concluding the trial court did not abuse its discretion in admitting the evidence despite a 30-year gap between the charged and uncharged offenses, the court emphasized the similarities between both the charged and uncharged offenses. In each case the victim was the same age—12 years old—and living in the defendant's home. Under the circumstances, the court concluded, the similarities in both offenses "'balance[d] out the remoteness of the prior offenses.'" (*Branch*, at p. 285; cf. *People v. Waples* (2000) 79 Cal.App.4th 1389, 1393-1395 [uncharged sexual offenses involving same victim occurring between 15 and 22 years before trial were not too remote so as to require exclusion under Evid. Code, § 352].)

Here, as in *People v. Branch, supra*, 91 Cal.App.4th 274, there are substantial similarities between the charged and uncharged offenses. Joseph preyed on girls (teenagers) living in his home. A.A., like D., was 15 years old at the time the molestation first began. Both had come from outside the United States to live with Joseph, and both were dependent on Joseph to provide them with the necessaries of life. Furthermore, as in *Branch*, there was no evidence of any jury confusion. To the contrary, the jury was repeatedly instructed Joseph was not on trial for the alleged prior uncharged offenses and could only consider that evidence for the limited purpose of determining whether Joseph was predisposed to commit the sexual offenses. (See *id.* at p. 284 [record provides no indication jury was confused by introduction of challenged evidence or that jurors wished

to convict appellant for uncharged offenses]; see also *People v. Boyette* (2002) 29 Cal.4th 381, 436 [jury presumed to have followed instructions].)

Joseph's assertion the prior offenses were too inflammatory—a contention directed to A.A.'s testimony that she was forced by Joseph to have sexual intercourse with him 50 to 100 times during the time she lived with him—fares no better. To be sure, Joseph's uncharged sexual crimes against A.A., although similar in many respects to the current offenses, were more serious than the pending charges. But the potentially inflammatory nature of those allegations was acknowledged by the trial court and considered by it as one factor in its Evidence Code section 352 analysis. On balance, the court concluded, the probative value of evidence of Joseph's prior sexual conduct with his daughter while she was living with him under circumstances similar to those confronting D. was not substantially outweighed by the potential for prejudice. That conclusion was well within the trial court's broad discretion. (See *People v. Branch, supra,* 91 Cal.App.4th at pp. 285-286.)

3. *Other Evidentiary Issues*

a. *Jane's testimony*

Joseph contends the court erred in overruling his Evidence Code section 352 objection to a portion of Jane's testimony during redirect examination. In particular, after defense counsel had concluded a vigorous cross-examination of Jane, questioning her credibility and positing motives for her to lie, the prosecutor indicated he had no further questions. At that point, Jane asked the court if she could say something. The court told her she could not say anything unless it was in response to a question. In response, the prosecutor requested—and the court permitted him—to reopen his redirect examination.

The prosecutor then asked Jane whether there was something else she had wanted to say in response to defense counsel's questions. Jane responded, "It makes me sick to my stomach today . . . to have to come here and talk about this. There is no reason for me to lie. . . ." After defense counsel's Evidence Code section 352 objection was overruled, Jane was permitted to continue: "I hope after today that this is the last time that I ever have to be in a courtroom. I have three kids of my own now, your Honor and I

will not come to Los Angeles if my kids wasn't with me. I don't leave my kids with anyone, and I try everything in my power to protect them and keep them safe, which is something I didn't have back then."

The trial court has broad discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice. (*People v. Lawley* (2002) 27 Cal.4th 102, 155.) Here, defense counsel's entire cross-examination was designed to portray Jane as a liar. In allowing Jane's testimony, the trial court apparently concluded it was in the interest of justice to permit her in redirect testimony to respond to that insinuation. The trial court allowed similar leeway for defense witnesses.[8] On this record, we simply cannot say the court's ruling was an abuse of its broad discretion in such matters (see *People v. Williams* (1997) 16 Cal.4th 153, 214; *People v. Lucas* (1995) 12 Cal.4th 415, 449) or that the admission of this very limited portion of Jane's testimony, even if error, was prejudicial (see Evid. Code, § 353 ["[a] verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless . . . the error or errors complained of resulted in a miscarriage of justice"]).

b. *Questions directed to D.'s demeanor*

During trial D. described in graphic detail the incidents of molestation. Noting her demeanor when testifying, the prosecutor asked her, without objection, "You say you have a nervous smile when you talk sometimes. Is that why you are smiling when you say this?" D. answered yes. The prosecutor also asked, "I know it is difficult. You cried in my office about this same testimony a little while ago, correct?" D. again answered yes. Defense counsel's objection to the latter question was overruled.[9] Joseph contends evidence D. had cried in the prosecutor's office is irrelevant and inflammatory

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8 During his direct testimony, Joseph's responses often veered toward a narrative, with his own counsel acknowledging, "We are starting to spill over into a free flow."

9 Because neither the defense counsel nor the court articulated the basis for the objection or the ruling, we cannot determine whether the objection was directed simply to the form of the question or had some other, more substantive basis.

and claims the court erred in overruling his objection. Apart from the improper form of the question—as phrased, the question certainly appears to be leading, a form generally not appropriate for direct examination (see Evid. Code, §§ 764 & 767, subd. (a)(1))—the inquiry was directed to explaining D.'s unusual demeanor while testifying. Contrary to Joseph's contention, evidence explaining D.'s demeanor is indeed relevant. (See Evid. Code, §§ 210 [relevant evidence includes "evidence relevant to the credibility of a witness"]; 780 ["[e]xcept as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to disprove the truthfulness of his testimony at the hearing"].) In any event, the admission of that limited portion of D.'s testimony was plainly harmless. (See *People v. Rowland* (1992) 4 Cal.4th 238, 264 [prejudicial effect of erroneous admission of evidence that is not federal constitutional error is evaluated under *People v. Watson* (1956) 46 Cal.2d 818, 836 standard of whether it is reasonably probable defendant would have received a more favorable result if evidence had been excluded].)

4. *The Prosecutor Did Not Commit Prejudicial Misconduct*

"'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution only when it comprises a pattern of conduct so "egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'"'" (*People v. Navarette* (2003) 30 Cal.4th 458, 506; accord, *People v. Morales* (2001) 25 Cal.4th 34, 44.)

Joseph contends the prosecutor committed prejudicial misconduct by repeatedly asking improper questions and impugning the integrity of defense counsel. We review a trial court's ruling regarding prosecutorial misconduct for abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 213.)

a. *The prosecutor's comments on punishment*

Joseph testified on direct examination that A.A., Jane and D. had conspired together to fabricate stories of molestation in order to "take him down." Seizing on Joseph's conspiracy theory during cross-examination, the prosecutor inquired whether Joseph was aware that the maximum sentence he could receive if he was convicted of the charged offenses was five years in prison, suggesting the allegations, if fabricated, would certainly have been more elaborate in order to guarantee greater punishment. The trial court sustained the defense's objection, denied the defense motion for a mistrial and admonished the jury, "Ladies and gentlemen, the whole issue[] of penalty or punishment is the court's decision. That is solely up to the court to determine if there was a conviction what the proper penalty or punishment is. That is solely the court's decision. So the purpose of this inquir[y] is not to put that issue before you because that is not an issue for the jury to decide."

The prosecutor's comment on punishment during cross-examination of Joseph was improper. (See *People v. Ruiloba* (2005) 131 Cal.App.4th 674, 692 ["[i]t is improper to tell a noncapital jury about possible punishment because that subject is not only irrelevant to the jury's factfinding function, it has the potential to deflect the jury by inviting discussion and speculation about the results of whatever findings it makes"]; *People v. Allen* (1973) 29 Cal.App.3d 932, 936 ["[i]t is settled that in the trial of a criminal case the trier of fact is not to be concerned with the question of penalty, punishment or disposition in arriving at a verdict as to guilt or innocence"].) Nonetheless, the court cured any potential prejudice by sustaining the objection to the question, striking the response and admonishing the jury specifically to disregard any reference to punishment, advising them that punishment was solely an issue for the court to decide. The court also instructed the jury with CALCRIM No. 200, providing, in part, "You must reach your verdict without any consideration of punishment." The court's actions amply cured any possible prejudice that may have otherwise resulted from the prosecutor's remark concerning punishment.

b. *The prosecutor's questions concerning C.W.*

The prosecutor asked Joseph during cross-examination whether he had ever told C.W. "I dreamt I had sex with you."[10] Joseph responded no. The trial court sustained a defense objection to the question on hearsay grounds and struck the response.

The prosecutor referred to the alleged incident again in his cross-examination of Jacobs. Jacobs had testified to Joseph's good character in his direct examination. On cross-examination, the prosecutor asked her whether she knew Joseph had told an 18-year-old C.W. he had dreamt he had sex with her. Jacobs said she had not heard that information. The court sustained the defendant's objection to the question and was about to grant a defense motion to strike the answer when defense counsel withdrew his motion to strike. The prosecutor moved on to another topic.

Joseph now contends the prosecutor's question to Jacobs was an improper effort to put inflammatory, inadmissible evidence before the jury and argues the prejudicial impact was not cured by the court's action sustaining the objection. Without question, the prosecutor's attempt to elicit what the People now acknowledge is hearsay not subject to any exception, especially after the court had sustained the prior objection in connection with Joseph's testimony, was inappropriate. (See, e.g., *People v. Smithey* (1999) 20 Cal.4th 936, 960 [improper for prosecutor to intentionally attempt to introduce inadmissible evidence]; accord, *People v. Chatman* (2006) 38 Cal.4th 344, 379-380 [prosecutor commits misconduct when he or she intentionally elicits inadmissible evidence or testimony].)

Nonetheless, even though the prosecutor's reference to C.W.'s statement was misconduct, the court acted promptly to prevent any potential prejudicial effect. In addition to sustaining the objection to the prosecutor's questions, the court instructed the jury in accordance with CALCRIM No. 222 that statements made by attorneys are not evidence and the jury must "ignore questions" to which an objection had been sustained

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10 Apparently, the prosecutor had based his question on a statement by C.W. included in a police report.

and answers that had been stricken. (See CALCRIM No. 222 ["Nothing that the attorneys say is evidence. . . . [¶] During the trial, the attorneys may have objected to questions or moved to strike answers given by the witnesses. I ruled on the objections according to the law. If I sustained an objection, you must ignore the question. If the witness was not permitted to answer, do not guess what the answer might have been or why I ruled as I did. If I ordered testimony stricken from the record you must disregard it and must not consider that testimony for any purpose."].) We presume the jury followed these cautionary instructions. (*People v. Smithey, supra,* 20 Cal.4th at p. 961.) Defense counsel did not request an additional admonition, and, indeed, nothing further needed to have been done to cure any prejudice. (See *ibid.*)

c. *The prosecutor's reference to defense counsel*

Alluding to the defense theory that the People's witnesses had fabricated their accounts of molestation, the prosecutor said in closing argument, "You got to make the call. If there is anyone that starts to get into this scenario, the defense scenario what he has suggested to you, and I suggested coached the witnesses along this theme, you are basically, one of them is lying to . . . ." The defense immediately interjected with an objection on the ground the comment essentially accused defense counsel of suborning perjury. The court sustained the objection and struck the prosecutor's comment. Then, denying defense counsel's request for a sidebar conference, the trial court stated in front of the jury, "I think it was an unintentional use of that term. I don't think [the prosecutor] meant to suggest that [defense counsel] has done anything inappropriate. Am I correct?" The prosecutor replied, "That is exactly correct," and explained he meant to suggest the defense witnesses had conspired among themselves to suggest D., A.A. and Jane were lying. He said he did not mean to suggest the defense counsel had done anything improper.

It is "improper for the prosecutor to imply that defense counsel has fabricated evidence or otherwise to portray defense counsel as the villain in the case." (*People v. Thompson* (1988) 45 Cal.3d 86, 112.) Here, to the extent the prosecutor's remarks could have been interpreted to suggest that defense counsel had "coached" his witnesses to lie,

the court promptly sustained a proper objection and allowed the prosecutor to clarify his statement. As discussed, the court also instructed the jury that statements by counsel were not evidence. (CALCRIM No. 222.) The prosecutor's errant remark, properly addressed by the trial court, provides no basis for reversal.

In sum, any improper remarks were promptly and properly addressed by the trial court. The alleged instances of misconduct, whether considered separately or cumulatively, do not compel reversal.

5. *Ineffective Assistance of Counsel Claims*

Joseph contends his counsel provided ineffective assistance by failing to object to evidence intended to impeach Matthew Joseph and by consenting to a procedure allowing a readback of testimony for a single juror.

a. *Impeachment evidence*

During his cross-examination of Joseph's son, Matthew Joseph, the prosecutor asked, over defense counsel's Evidence Code section 352 objection, whether he had ever been criminally accused in Texas of using his vehicle to evade law enforcement. He admitted he had been charged with that conduct, a misdemeanor in Texas, but explained he had made a wrong turn and was unaware that police were following him until he arrived at his home. No other evidence as to this conduct was admitted.

Joseph contends Matthew Joseph's conduct—using his vehicle to evade police—did not involve moral turpitude and was therefore irrelevant and inadmissible. (See *People v. Castro* (1985) 38 Cal.3d 301, 314 [conduct involving moral turpitude may suggest a "readiness to lie" and is therefore admissible, subject to Evid. Code, § 352]; *People v. Wheeler* (1992) 4 Cal.4th 284, 295 [Cal. Const., art. I, § 28, subd. (d), "makes immoral conduct admissible for impeachment whether or not it produced any conviction, felony or misdemeanor"].) Although he acknowledges his counsel failed to object to the evidence on the ground the conduct did not involve moral turpitude (see *People v. Ward*

(2005) 36 Cal.4th 186, 211 [failure to object on ground in trial court results in forfeiture of ground on appeal]), he insists the omission amounts to ineffective assistance.[11]

Whether or not evasion of police detention is conduct involving moral turpitude, the very limited evidence, as explained by Matthew Joseph, hardly impeached his veracity. Joseph described his conduct as an innocent mistake, and no evidence was admitted to contradict that explanation. Thus, even if the failure to object to this line of questioning was not based on a legitimate tactical decision and was professionally deficient, it is not reasonably probable the exclusion of the evidence would have resulted in a more favorable verdict. (See *In re Fields* (1990) 51 Cal.3d 1063, 1079 [In considering a claim of ineffective assistance of counsel, it is not necessary to determine "'whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'"].)

b. *Read-back of Jane's testimony*

After Jane had completed her testimony, the bailiff advised the court one of the jurors (juror number 7) had told him he had had difficulty understanding Jane's testimony because she "spoke fast and had an accent." The trial court informed the jury, "If a witness is testifying and you didn't understand what [he or she] said, you can raise your hand. We will have that part either restated by the witness or read by the reporter." Juror

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11 To prevail on this claim, Joseph must establish his counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's deficient performance, a more favorable result would have been achieved. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-687 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Williams* (1997) 16 Cal.4th 153, 215.) On direct appeal, a conviction will only be reversed for ineffective assistance of counsel when the record demonstrates there could have been no rational, tactical purpose for counsel's challenged act or omission. (See *People v. Lucas* (1995) 12 Cal.4th 415, 442-443; see also *Strickland*, at p. 689 [there exists a presumption that the alleged deficiency in representation "'might be considered sound trial strategy'" under the circumstances].)

number 7 was told, "If you didn't understand any portion [of Jane's] testimony, we will have the reporter read that back" before jury deliberations begin.

Prior to closing argument, the trial court told the jury, "Ladies and gentlemen, before we go to argument, earlier in the trial the juror in seat 7 indicated that he had trouble understanding the first witness because of her accent. So, because it is important that you all are evaluating the same evidence, I am going to have a readback of that first witness for juror number 7. If there is any other juror who couldn't understand that witness because of her accent or whatever, you are welcome to stay in the courtroom and listen to the readback also." Defense counsel consented to this procedure.

Joseph contends the readback of the testimony without the full jury present violated his due process right to a fair trial because not all 12 jurors had the opportunity to evaluate the testimony in the same manner: Some jurors had the opportunity for a simultaneous evaluation of Jane's testimony and demeanor, while, according to Joseph, juror number 7 did not.[12] Although Joseph acknowledges his counsel consented to the readback procedure, he contends his counsel's agreement constituted ineffective assistance.

Joseph has cited no authority for the proposition that his counsel's agreement to the readback of testimony for the juror who had requested it prior to the commencement of deliberations was professionally deficient, nor has he demonstrated a reasonable probability he would have been acquitted had the court insisted that all jurors remain in the courtroom to hear the readback of testimony (testimony, we note, that was not at all favorable to Joseph). In fact, in this appeal Joseph has provided no specific argument directed to his ineffective assistance claim on this point. On this record, that claim necessarily fails.

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12 The record does not indicate how many of the jurors remained in the courtroom for the readback of Jane's testimony.

6. *Cumulative Error*

In his 90-page appellate brief Joseph has identified a number of purported errors by the trial court and the prosecutor. As discussed most of the arguments lack merit; none of the claimed errors resulted in prejudice. The evidence against Joseph—in particular, the testimony of D., A.A., and Jane—was overwhelming and entirely unaffected by the errors alleged. Thus, even when the alleged errors are considered together for their cumulative effect, there is no basis for concluding Joseph was deprived of a fair trial. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1009 [a defendant "is entitled to a fair trial but not a perfect one"]; *People v. Seaton* (2001) 26 Cal.4th 598, 675, 691-692 ["the few minor errors, considered singly or cumulatively, were harmless"].)

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.